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No. 496

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

WIEN ALASKA AIRLINES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner Wien Alaska Airlines, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on April 6, 1967.

OPINIONS BELOW

The United States District Court for the District of Alaska did not render an opinion. The opinion of the Court of Appeals for the Ninth Circuit (App. B, *infra*, pp. 23-25) is reported at 375 F.2d 736.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* p. 26) was entered on April 6, 1967. A timely petition for rehearing *en banc* was denied on May 18, 1967 (App. D, *infra,* p. 26). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. § 757(b), bars a third-party claim against the United States for non-contractual indemnity in an action where the plaintiff is an F.E.C.A. beneficiary and the federal employee whose negligence gave rise to the claim is a third-party defendant.

STATUTES INVOLVED

The statutory provisions involved are Sections 7(b) and 27 of the Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. §§ 757(b), 777, and Sections 1346(b) and 2676 of the Federal Tort Claims Act, 60 Stat. 842, as amended, 28 U.S.C. §§ 1346(b), 2676 (App. A, *infra,* p. 21-22).

STATEMENT

This case arises out of the crash of one of petitioner's aircraft. The facts, admitted as true by respondent on its motion for summary judgment below, are briefly as follows: On April 17, 1964, petitioner's pilot was preparing to take off in petitioner's Cessna 185 aircraft from an airstrip at Moses Point, Alaska, for a daylight visual flight to Nome along the southern coast of the Seward Peninsula. The flight was part of petitioner's "bush operations" in Alaska—an air service

to sparsely-populated regions of northern and western Alaska provided by light aircraft equipped with skis in the winter. The sole passenger on board the aircraft was Kurt E. Backlund, an employee of the United States Federal Aviation Agency (F.A.A.).

Prior to take-off the pilot radioed the Moses Point Flight Service Station, operated by the F.A.A., and asked for the present and forecast weather for the purpose of planning a visual flight to Nome—that is, a flight which would not take the aircraft into weather requiring the pilot to fly on instruments. The Air Traffic Control Specialist on duty on that date was Anthony J. Narcisso, an employee of the F.A.A. Narcisso answered the call and gave the pilot "erroneous present and forecast weather which told [the] pilot that he could expect visual flying conditions along his intended flight path and at his destination" (R. 16). As a result of this information the pilot took off but the aircraft crashed shortly thereafter when it encountered weather conditions which did not permit visual flight. Both the pilot and Kurt E. Backlund were killed in the crash.

Backlund's widow, suing as administratrix of her husband's estate on behalf of herself and the surviving children, brought this action for wrongful death against petitioner in Alaska Superior Court, Third Judicial District (R. 1-4). Petitioner denied liability (R. 5-8) and moved for leave to implead Narcisso as a third-party defendant (R. 11-13). Petitioner's third-party complaint asked for full indemnity from Narcisso in the event it was held liable to the plaintiff on the ground that Wien's negligence, if any, was only passive or secondary, while the negligence of Narcisso was active and primary (R. 15-17). Petitioner's motion

was granted (R. 14) and Narcisso was impleaded in the state court action.

The United States Attorney in Anchorage appeared as counsel for Narcisso and removed the entire action to the United States District Court for the District of Alaska pursuant to the provisions of 28 U.S.C. § 1442(a)(1).[1] After removal to federal court Narcisso filed an answer in which he denied liability (R. 27). Petitioner then moved the district court for leave to amend its third-party complaint to add Narcisso's employer, the United States, as an additional third-party defendant (R. 21-25). The district court granted petitioner's motion (R. 31) and petitioner filed an amended third-party complaint seeking full indemnity from both Narcisso and the United States on the ground set forth above (R. 32-38). Thereafter the Government filed a motion for summary judgment, attaching to it certain exhibits which showed that Kurt E. Backlund had been an employee of the F.A.A. at the time of his death, that the Federal Bureau of Employees' Compensation had ruled that he was in the performance of his duties when killed, and that a compensation award had been entered under which Mrs. Backlund was receiving monthly payments of $525.00 for her-

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[1] Section 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

self and her children (R. 39-40). The Government argued to the district court that since Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. § 757(b), barred any tort claim by Mrs. Backlund against the United States, the Government could not be liable to petitioner for all or part of her claim against Wien. The Government relied in this argument upon the Ninth Circuit's ruling in *United Air Lines, Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed,* 379 U.S. 951 (1964), an action in which third-party claims against the United States for non-contractual indemnity were held barred where the plaintiffs were F.E.C.A. beneficiaries. The district court granted the Government's motion on the authority of *Wiener,* dismissed petitioner's third-party claim against the United States with prejudice, and directed the entry of a final judgment in favor of the Government pursuant to Rule 54(b) Fed. R. Civ. P. upon an express determination that there was no just reason for delay only (R. 41, 42).

On appeal to the Ninth Circuit petitioner sought reversal of the *Wiener* case, arguing that the holding in that case was contrary to this Court's rulings in *Weyerhaeuser* v. *United States,* 372 U.S. 597 (1963), and *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963); and that it resulted in the abrogation of this Court's decision in *United States* v. *Gilman,* 347 U.S. 507 (1954). The court of appeals affirmed the judgment below "on the authority of *Wiener, supra*" (R. 54), and denied petitioner's timely petition for rehearing *en banc* on May 18, 1967 (R. 56).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Has Decided an Important Federal Question in a Way in Direct Conflict With the Decisions of This Court in Weyerhaeuser and Treadwell.

The decision of the court below in this case, which affirms a rule enunciated by it in *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964), is in direct conflict with the decisions of this Court in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963) and *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). In the *Weyerhaeuser* case this Court, in a unanimous opinion written by Mr. Justice Stewart, held that Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. § 757(b), did not bar a claim by a shipowner against the United States for contribution based on the admiralty rule of divided damages. In that case a federal government employee named Ostrom sustained personal injuries when the Army Dredge he was on collided with a vessel owned by the Weyerhaeuser Steamship Company. Ostrom was awarded compensation in the sum of $329.01 under F.E.C.A. He then sued the shipowner and was paid $16,000 in settlement of his claims. Upon receipt of this settlement Ostrom repaid the United States the $329.01 he had received as compensation, as required by the Compensation Act. 5 U.S.C. § 777 (App. A, *infra*, p. 21). The shipowner then sued the United States in admiralty to recover damages. The district court found the two vessels mutually at fault for the collision and applied the admiralty rule of divided damages, including in the shipowner's damages the $16,000 paid to Ostrom. 174 F.Supp. 663, supplemented by 178 F.Supp. 496. The Ninth Circuit reversed, holding that Section 7(b) F.E.C.A. barred the

inclusion of the amount paid in settlement. 294 F.2d 179. The Ninth Circuit concluded that the purpose of Section 7(b) was to provide limited liability to the United States as an employer, and that "to allow a third party recovery against the United States on any ground *is* subversive of the statute limiting the liability of the United States." 294 F.2d at 181.

This Court granted certiorari in *Weyerhaeuser* and reversed the Ninth Circuit, unanimously rejecting its literal construction of Section 7(b). Finding the meaning of the statute far from "plain," as urged by the Government, this Court reviewed the legislative history of the Federal Employees' Compensation Act, originally passed in 1916, and Section 7(b), added in 1949, to ascertain the purpose behind that section. This Court said that the legislative history showed that in passing Section 7(b) Congress had been concerned with suits filed by federal government employees under various statutes against either the United States or corporate instrumentalities of the Government for the purpose of supplementing the inadequate benefits received by those employees under F.E.C.A.[2] This Court concluded:

> *The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties,* much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases. 372 U.S. at 601 (emphasis added).

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[2] S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949), quoted in 372 U.S. at 601.

In the *Treadwell* case, *supra,* a federal government employee named Drake was seriously injured when a steel tank exploded while he was testing ordnance at the United States Army Arsenal in Watertown, Massachusetts. The tank was manufactured by Treadwell for the United States. Drake began receiving compensation payments from the Government under F.E.C.A. and he filed an action against Treadwell in United States District Court for the Western District of Pennsylvania. Treadwell impleaded the United States seeking full indemnification or contribution. Drake's main claim against Treadwell was tried before a jury, which returned a verdict in favor of the plaintiff for $180,000. A non-jury trial was then held on Treadwell's third-party claim against the Government and the district court found the Government to be a joint tortfeasor with Treadwell and awarded contribution in favor of Treadwell in the amount of $90,000.

The Government appealed this judgment to the Third Circuit, where the case was argued after the Ninth Circuit's *Weyerhaeuser* opinion but before this Court had granted certiorari in that case. The Third Circuit, finding no substantial distinction between a claim for contribution in admiralty and one at law, followed the "similar reasoning" of the Ninth Circuit in *Weyerhaeuser* and held that Section 7(b) F.E.C.A. barred Treadwell's claim for contribution or indemnity. 299 F.2d 789. The Third Circuit compared the "normal maritime rule of contribution" in the *Weyerhaeuser* case with the rule allowing contribution between joint tortfeasors, and concluded that both were "clearly within the language of Section 7(b)." 299 F.2d at 791. This Court granted certiorari in *Treadwell* three weeks after it decided the *Weyerhaeuser*

case, vacated the Third Circuit's judgment and remanded the case to the district court "for further consideration in light of *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597." 372 U.S. 772.

In the *Wiener* case, *supra,* 31 actions for wrongful death were brought against United Air Lines as a result of a mid-air collision between its DC-7 and a United States Air Force F-100 jet fighter. In nine of the actions the plaintiffs' decedents were federal government employees. United sought non-contractual indemnity from the United States in all 31 cases and was awarded it by the Ninth Circuit in the 22 non-Government cases. As to the nine government employee cases, however, the Ninth Circuit affirmed the district court's dismissal of United's third-party claim for non-contractual indemnity. 335 F.2d at 402-404. The court of appeals, speaking through Judge Jertberg, said:

> [The Government] argues that by operation of the exclusive liability provision of this section [§ 7(b) F.E.C.A.] there is no underlying tort liability of the government to its employees and therefore there is no basis for indemnification. In our view United's claim for indemnity is . . . barred in accordance with . . . [this] contention. 335 F.2d at 402.

In answer to United's argument that this Court's pronouncements in *Weyerhaeuser* and *Treadwell* precluded such a result, the court of appeals said:

> The Supreme Court in Weyerhaeuser S.S. Co. v. United States, . . . held that the express provisions of [§ 7(b)] . . . do not qualify the historic admiralty rule of divided damages in mutual fault collisions. The admiralty rule of divided damages

> is to be distinguished from the rule of indemnity urged upon us by United since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured.
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> * * * * *
>
> United's claim for indemnity is not based upon a duty owed by the government to United by virtue of a contract, attenuated or otherwise, or by operation of a rule of law such as the divided damage rule of admiralty. There being no underlying liability on the part of the government, United's claim for idemnity must fall. We do not agree with United that the Supreme Court's remand in the case of Treadwell Construction Co. v. United States . . . [per curiam], represents a rejection by the court of these well settled principles. 335 F.2d at 402-404.

Petitions for certiorari were filed in *Wiener* by both United and the Government, but were later dismissed when the case was settled. 379 U.S. 951.

In the instant case petitioner sought reversal of *Wiener*, but the Ninth Circuit, speaking again through Judge Jertberg, affirmed the ruling and language of that case. Petitioner submits that the court of appeals' decision in the instant case, as in *Wiener*, is in direct conflict with this Court's decisions in *Weyerhaeuser* and *Treadwell* because there is no valid distinction between a claim for contribution in admiralty

and one for non-contractual indemnity at law insofar as the effect of Section 7(b) F.E.C.A. is concerned. This is so for at least three reasons: First, a claim for non-contractual indemnity is not based solely upon a duty owed by the indemnitor to the injured party. Such a claim has several bases, including one identical to the admiralty rule—a duty owed by the indemnitor to the indemnitee. As Dean Prosser states in this Treatise:

> Out of all this, it is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. It has been said that it is permitted only where the indemnitor *has owed a duty of his own to the indemnitee;* that it is based on a "great difference" in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is the complete answer, and, as is so often the case in the law of torts, no one explanation can be found which will cover all of the cases. Indemnity is a shifting of responsibility from the shoulders of one person to another; *and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other.* This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct. PROSSER, LAW OF TORTS 281 (3d ed. 1964) (emphasis added).

Second, contribution or indemnity may be awarded without "the support of liability on the part of the indemnitor to the person injured." 335 F.2d at 403. The most common example is the case where the third-

party defendant cannot be liable to the plaintiff because the statute of limitations has run. *See, e.g., Keleket X-Ray Corporation* v. *United States,* 275 F.2d 167 (D.C. Cir. 1960).

Third, the cases which hold that there is a requirement of "underlying liability" or "common liability" are both illogical and unsound. Judge Jertberg relied upon *American Mut. Liability Ins. Co.* v. *Matthews,* 182 F.2d 322 (2d Cir. 1950), in making the aforementioned "distinction" in *Wiener.* The *Matthews* case involved a similar problem—whether Section 5 of the Longshoremen's and Harbor Workers' Compensation Act,[3] which is "nearly identical"[4] to Section 7(b) F.E.C.A. barred a claim for contribution by the shipowner against the injured employee's stevedoring employer. Judge Swan disallowed the claim on the ground that the shipowner and the stevedoring employer were not "joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured." 182 F.2d at 323. Professors Hart and Sacks trenchantly criticized the *Matthews* case as follows:[5]

> Why should there have to be "a common liability to the party injured?"
>
> A possible answer to this question might have been . . . that the right of contribution rests on the equitable principle of avoidance of unjust enrichment. The tortfeasor who pays the whole

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[3] 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* 33 U.S.C. § 905 is "nearly identical" to Section 7(b) F.E.C.A.

[4] *Weyerhaeuser* v. *United States,* 372 U.S. at 602.

[5] Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tenta. ed. 1958).

> amount of the damages which the two in combination have caused thereby effects the discharge of the other, since there cannot be a double recovery. For this benefit the other should pay or he will be unjustly enriched, and a fair measure of the benefit is fifty-fifty.
>
> It will be observed that if a common liabilty exists, this principle will serve always to justify contribution. *But it will be observed that the principle may be invoked also where the liabilities are not common either in the sense of being identical in amount or in the sense of flowing from breach of the same kind of duty. All that is necessary is that they be mutually exclusive in the sense that a satisfaction of one is a discharge of the other.* Hence, if [the shipowner's] payment of [the employee's] judgment had served to benefit [the stevedoring employer] by wiping out its liability to pay compensation, there would have been a basis for a claim by [the shipowner] for contribution at least in some amount. (pp. 524-525, emphasis added).

In the instant case the liabilities are mutually exclusive because the Government's liability to Mrs. Backlund under F.E.C.A. will be immediately discharged if petitioner is held liable to pay a judgment to her. 5 U.S.C. § 777. That is all that is—and should be—required by law to support a claim for indemnity, since that doctrine is based primarily upon the theory that a wrongdoer shall not be unjustly enriched.

The importance of the federal question involved in this case need not be labored here. Suffice it to say, this Court has twice granted certiorari to review lower court decisions concerning this very point—the effect of § 7(b) F.E.C.A. on a third party's claim for contribution or indemnity against the Government. The

number of federal government employees covered by F.E.C.A.,[6] the number of injuries sustained by them yearly,[7] and the pervasive nature of the Government's activities in our daily lives, all show conclusively that this is a federal question of the utmost importance and one which should be passed upon—and indeed, has been passed upon—by this Court.

II. The Ninth Circuit Has Rendered a Decision on an Important Federal Question in Direct Conflict With Applicable Decisions on the Same Matter in the Third Circuit.

In *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962), the Third Circuit held that Section 7(b) F.E.C.A. barred a third-party claim against the United States for contribution or indemnity where the plaintiff was an F.E.C.A. beneficiary. As noted above, this Court granted Treadwell's petition for certiorari, vacated the court of appeal's judgment, and remanded the case to the United States District Court for the Western District of Pennsylvania "for further consideration in light of *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597." 372 U.S. 772.

On remand to the district court the Government moved for further consideration of the question of liability of the United States, arguing that "The Weyerhaeuser decision was specifically restricted to the admiralty rule of divided damages in mutual fault collision cases and has no application to cases involving contribution under State law between joint tort-

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[6] 2,500,000 federal employees were covered by the Act in 1966 according to U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1966, at 412 (87th ed. 1966).

[7] 110,000 non-fatal injuries and 337 fatal injuries were sustained by federal employees in 1965. *Id.*

feasors."[8] The district court rejected this contention and reinstated its earlier judgment in favor of Treadwell.[9] The Government filed a notice of appeal from this judgment but later moved to dismiss the appeal "for the reason that the Solicitor General of the United States has recommended against appeal. . . ."[10] The appeal was subsequently dismissed.[11]

One month later this identical question came before the United States District Court for the Eastern District of Pennsylvania in *Hart* v. *Simons,* 223 F. Supp. 109 (E.D. Pa. 1963). In that case the plaintiff, a federal government employee injured by a machine in the course of her employment, sued the manufacturer of the machine after receiving F.E.C.A. benefits. The manufacturer impleaded the United States seeking contribution or indemnity. *The Government did not move for dismissal of the third-party complaint.* The plaintiff however, made such a motion, urging that Section 7(b) F.E.C.A. barred any recovery by the manufacturer against the United States. In its opinion the district court noted that this question had been decided by the Third Circuit in favor of the United States in *Drake* v. *Treadwell, supra.* It said, "This decision, of course, would control the present case except that Treadwell was considered by the United States Supreme Court which entered an order [vacating

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[8] Memorandum Order filed July 8, 1963 in *Drake* v. *Treadwell Construction Co., et al,* United States District Court for the Western District of Pennsylvania, Civil Action No. 14517.

[9] Order of Court filed July 9, 1963. *Id.*

[10] Motion for Dismissal of Appeal filed September 24, 1963. *Id.*

[11] Order filed September 24, 1963. *Id.*

the judgment]." After reviewing the *Weyerhaeuser* and *Treadwell* cases the district court said:

> Using the same language and following the reasoning of the Supreme Court in the Weyerhaeuser case, it must be concluded also that there is no evidence that Congress in enacting the exclusive liability section of the Federal Employees' Compensation Act was concerned with the rights of unrelated third parties, *much less of any purpose to disturb settled doctrines of the law of contribution or indemnity affecting the mutual rights and liabilities of parties in tort cases.* The motion to dismiss must be denied.
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> * * * * *
>
> The United States is not shielded from liability by the exclusive liability provisions of the Federal Employees' Compensation Act. Treadwell Construction Co. v. United States, 372 U.S. 772, 83 S.Ct. 1102, 10 L.Ed.2d 186 (1963); Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed.2d 1 (1963). (223 F.Supp. at 111, emphasis added).

It can thus be seen that because of this Court's vacation of the judgment in *Drake* v. *Treadwell Construction Co., supra,* the rule in the Third Circuit on this important federal question is in direct conflict with the rulings of the Ninth Circuit in *Wiener* and the instant case. It is unlikely that this issue will ever again reach the Third Circuit since the Government is no longer raising this defense in that Circuit. But even if the question should be appealed by some other party it is unconceivable that the Third Circuit would rewrite *Drake* v. *Treadwell Construction Co.,* 299 F.2d 789. The court of appeals found in that case that there was no distinction between contribution in admiralty and contribution or indemnity at law so far as the

effect of Section 7(b) F.E.C.A. is concerned. It cannot seriously be argued that the Third Circuit would now accept the Ninth Circuit's "distinction" of *Weyerhaeuser* and *Treadwell,* which in truth is mere semantics. Therefore, these circuits are in direct conflict on this important federal question and this Court should grant certiorari to resolve this conflict.

III. The Ninth Circuit's Decision in This Case Is in Direct Conflict With This Court's Ruling in United States v. Gilman That the United States May Not Recover Indemnity From Its Employee Whose Negligence Gave Rise to the Claim

In *United States* v. *Gilman,* 347 U.S. 507 (1954), this Court unanimously held that the Government could not recover indemnity from one of its employees whose negligence gave rise to the claim against the United States under the Federal Tort Claims Act. Weighing the financial burden to the United States imposed by a rule prohibiting indemnity against the financial burden to federal government employees imposed by a rule allowing it, this Court found in favor of the employee. It noted that 28 U.S.C. § 2676 (App. A, *infra,* p. 22) makes any judgment against the United States a complete bar to any action against the federal employee whose act or omission gave rise to the claim, and found that the statutory scheme of the Federal Tort Claims Act barred any claim by the Government against the negligent employee for indemnity.

It will be noted that the result of the Ninth Circuit's ruling in the instant case is to abrogate this Court's holding in *Gilman.* Except for drivers of government motor vehicles,[12] the government employee whose act or omission gave rise to the claim may be

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[12] 28 U.S.C. § 2679(b).

sued as well as the United States, whose liability is based upon *respondeat superior*. That was done here when petitioner impleaded Narcisso in the state court action. If Section 7(b) F.E.C.A. is no bar to petitioner's third-party claim against the United States, then a judgment against the Government in the third-party action would constitute a complete bar to petitioner's third-party claim against Narcisso. 28 U.S.C. § 2676. But if Section 7(b) bars petitioner's claim against the Government and Narcisso is found in this case to be either the sole tortfeasor or the active tortfeasor if petitioner and Narcisso are held not to be *in pari delicto,* then Narcisso will pay *all* of any judgment entered in favor of plaintiff. Not only that, upon receipt of this judgment the plaintiff will be required to reimburse the Government for the amount of compensation already paid her under F.E.C.A. and the United States will be discharged from further liability under that Act. The result is the indemnification of the United States by Narcisso, which has been held by this Court to be barred by the Tort Claims Act.

As noted by this Court in *Gilman,* this federal question is a matter of utmost importance to hundreds of thousands of federal government employees. In the field of aviation alone the potential liability of individual federal government employees is daily becoming more apparent. In *Ingham* v. *Eastern Air Lines, Inc.,* 373 F.2d 227 (2d Cir. 1967), a case factually similar to the instant case, the Government was recently held liable for the negligence of an F.A.A. Air Traffic Controller in failing to provide accurate and up-to-date weather information to the pilot of a passenger-carrying aircraft. Add to the facts of the *Ingham* case an aircraft loaded with federal government employees

and the Ninth Circuit's ruling in *Wiener* and the instant case becomes intolerable for Air Traffic Controllers alone.[13] When one adds to the field of aviation all the other fields in which the Government is intimately involved, it becomes readily apparent that the instant case involves a federal question of utmost importance to hundreds of thousands of federal government employees, and this Court should grant certiorari to review the Ninth Circuit's ruling on this question.

IV. Even If the Government's Argument That This Case Is Distinguishable From Weyerhaeuser and Treadwell Is Accepted, Then the Ninth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

Even if the Ninth Circuit's distinction of the *Weyerhaeuser* and *Treadwell* cases is valid, which petitioner strongly denies, then that court's ruling in *Wiener* and the instant case—that § 7(b) F.E.C.A. bars third-party claims against the United States for non-contractual indemnity where the plaintiff is an F.E.C.A. beneficiary—is the first abrogation by a court of appeals[14] of an ancient common law tort doctrine based upon the premise that a wrongdoer shall not be unjustly enriched. Certainly all the reasons which caused this Court to grant certiorari in *Weyerhaeuser* to review

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[13] A further intolerable consequence of the *Wiener/Wien* rule for Air Traffic Controllers and other government employees is the fact that, as here, they will be represented in any action against them by the United States Attorney, who will make every effort to get their employer dismissed from the case, leaving them to pay the judgment.

[14] *Busey* v. *Washington*, 225 F. Supp. 416 (D. D.C. 1964), decided several months before *Wiener*, is in accord. *Busey* was settled while on appeal to the United States Court of Appeals for the District of Columbia Circuit.

the Ninth Circuit's abrogation of an ancient admiralty doctrine of contribution are applicable to this case involving that court's abrogation of a common law right of indemnity.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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